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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

PULSE~LINK INCORPORATED, Plaintiff, v. TZERO TECHNOLOGIES INCORPORATED, Defendant.	**CASE NO. 07 CV 2407 JAH (AJB)** **JOINT RULE 26(F) REPORT AND JOINT DISCOVERY PLAN** **[LOCAL RULE 26.1]** **DATE: APRIL 23, 2008** **HON. ANTHONY J. BATTAGLIA**

TO: Honorable Magistrate Anthony J. Battaglia:

On April 2, 2008, counsel for Plaintiff PULSE~LINK Incorporated and counsel for Defendant Tzero Technologies Incorporated conferred telephonically pursuant to Rule 26(f) of the Federal Rules of Civil Procedure. The following summarizes the parties' views of the matters required by Rule 26(f) and Local Rule 26.1.

Factual Summary

Plaintiff PULSE~LINK Incorporated ("PULSE~LINK") alleges that Defendant Tzero Technologies Incorporated ("Tzero") has engaged in false advertising in violation of Section 43(a) of the Lanham Act (15 U.S.C. § 1125(a)). PULSE~LINK also alleges that Tzero engaged in unfair competition, intentional and negligent interference with PULSE~LINK's prospective economic relations, and false and misleading advertising in violation of California statutory and common law.

Tzero denies that it has made any false statements regarding PULSE~LINK or its products. Tzero contends that all it has done has been to compete with PULSE~LINK on the merits—to the extent that it competes with PULSE~LINK at all; indeed, as PULSE~LINK admits in its Complaint, none of the statements that PULSE~LINK alleges are false even mention PULSE~LINK or any of PULSE~LINK's products. *See, e.g.*, PULSE~LINK's Complaint at ¶ 37.

The complaint was filed on December 21, 2007 with the Court. Defendant Tzero answered the complaint on January 25, 2008 with multiple affirmative defenses. On March 10, 2008, the Court held a ENE Hearing in the 07cv2156 case (recently consolidated as 07cv1125) at which time the potential settlement of this case was also discussed. Since then, the parties have continued to meet to discuss the potential settlement of this case. On April 2, 2008, counsel held a telephonic conference pursuant to Rule 26(f) of the Federal Rules of Civil Procedure to discuss the case. Although the parties have not reached a settlement, they are continuing to discuss potential settlement in good faith and have exchanged draft settlement agreements. A telephonic Case Management Conference is scheduled for April 30, 2008 before the Honorable Anthony J. Battaglia.

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Principal Issues Of The Case

PULSE~LINK contends that the principal issues in this case are: (1) whether Defendant Tzero has made false, deceptive and misleading descriptions and misrepresentations regarding the nature, characteristics, qualities and/or approval of both PULSE~LINK's technology and/or Tzero's competing technology in violation of Section 43(a) of the Lanham Act (15 U.S.C. § 1125(a); (2) whether Defendant Tzero has engaged in unfair competition and deceptive trade practice in violation of Cal. Bus & Prof. Code §§ 17200 *et seq*.; (3) whether Defendant Tzero has intentionally interfered with PULSE~LINK's prospective economic relations in violation of California common law; (4) whether Defendant Tzero has negligently interfered with PULSE~LINK's prospective economic relations in violation of California common law; (5) whether Defendant Tzero has engaged in false and misleading advertising in violation of Cal. Bus & Prof. Code §§ 17500 *et seq*. and the common law; (6) whether Defendant Tzero has engaged in unfair competition in violation of California common law; and (6) the appropriate damages, judgment, and/or injunctive relief, if any, with regard to the above claims.

Tzero contends that one of the principal issues in this case is whether competition on the merits, including making true statements that do not even mention PULSE~LINK or its products, can form the basis for a Lanham Act/false advertising case.

Initial Disclosures

The parties have discussed the exchange of the Rule 26(a) disclosures, and have agreed to exchange initial disclosures by May 1, 2008.

Not A Complex Case

The parties do not consider this a complex case that should be governed by the rules set forth in the Manual for Complex Litigation.

Discovery Plan

The parties have not been able to agree on the governing schedule. Accordingly, the table below lists each party's proposed deadlines for this case.

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Event	**Plaintiff's Proposal**	**Defendant's Proposal**[1]
Close of Fact Discovery	November 10, 2008[2]	February 6, 2009
Opening Expert Reports:	October 6, 2008	March 6, 2009
Rebuttal Expert Reports:	October 27, 2008	May 8, 2009
Expert Discovery Cut Off:	November 10, 2008	June 26, 2009
Motion Cut Off:	December 9, 2008	July 31, 2009
Pretrial Conference:	January 19, 2009	September 11, 2009
Jury Trial:	February 16, 2009	November 2, 2009

The parties anticipate discovery related to each of the issues identified in the Factual Summary and Principal Issues of the Case sections of this report.

Discovery and Document Production Issues

The parties have agreed to jointly prepare and submit to the Court a Stipulated Protective Order that will facilitate disclosures under Rule 26 and the discovery process as well as contain the parties' agreements regarding privilege issues.

The parties have discussed electronic discovery and are continuing to confer regarding the form in which documents stored electronically will be produced. The parties have discussed and have taken steps to preserve discoverable information including electronically stored documents and information.

Modifications to the Federal Rules Regarding Discovery

Tzero proposes that the parties be limited to seven (7) depositions each in this case. Tzero contends that this case focuses on statements made in marketing and seven depositions is sufficient for the two start up companies in this case to obtain the information that they need through

[1] Tzero notes that Plaintiff's proposal for expert discovery would have expert reports in this action due months before expert reports are due in Case No. '07 CV 1125 L (AJB)—despite the fact that Plaintiff initiated Case No. '07 CV 1125 L (AJB) exactly half a year before it initiated the instant action. Pulse~Link responds that, because Judge Lorenz has rejected a low-number referral of this Action, despite Pulse~Link's filing of a Notice of Related Cases, the present action is before Judge Houston and, presumably, is not considered to be sufficiently related to require trial at the same time. Accordingly, the schedule in the present case need not be tied to the schedule in the 1125 Action.

[2] Pulse~Link believes that fact and expert discovery should end on the same date: November 10, 2008.

depositions. Plaintiff Pulse~Link does not agree that Defendant's proposal is appropriate in this case. Defendant's proposed limitation—which almost cuts in half the available depositions normally permitted to each party—is contrary the Federal Rules, unduly restrictive and not warranted in this case. Further, because Pulse~Link anticipates that it will be required to depose not only Tzero employees involved in making the false statements, but also third parties to whom the false statements were made, including customers and potential customers, at least ten depositions per side are warranted. Plaintiff proposes that the parties simply follow the Federal Rules of Civil Procedure whereby each party may take up to ten (10) depositions, with the ability to seek additional depositions beyond this limit for good cause shown.

The parties agree that communications with testifying experts, including correspondence and drafts of expert reports, shall not be discoverable.

The parties propose to modify the requirements of F.R.C.P. 26(b)(5)(A) as they apply to documents created after the filing of the Complaint. In this regard, the parties propose that to the extent discovery requests call for documents protected by the attorney-client and/or work-product doctrines which were a) created after the filing of the Complaint, and b) involve counsel of record in this case, such documents need not be entered into a privilege log or otherwise described as indicated in F.R.C.P. 26(b)(5)(A). Finally, the parties have consented to service by email in this case. The parties have furthermore agreed that service via email shall be considered the same as hand service for purposes of calculating deadlines under the Federal Rules of Civil Procedure as long as such email is sent no later than 5:30 P.M. (PST).

Motion Schedule

The parties contemplate that one or both of them will make one or more motions for summary judgment at the appropriate time.

Potential Settlement

The parties have discussed settlement outside the presence of counsel, but have not reached a resolution at this point. The parties are continuing in good faith to try to settle this case and are close to reaching an agreement. In fact, the parties have exchanged drafts of settlement agreements.

Trial Estimate

The parties estimate that a jury trial in this action will require 5 days.

Additional Parties

At this time, neither side anticipates the appearance of additional parties. Unless discovery yields new evidence, it is not anticipated that any other additional parties will be added or that the complaint or counterclaims will be amended to additional parties.

Respectfully submitted,

DATED: April 23, 2008

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Attorneys for Defendant
TZERO TECHNOLOGIES INC.

DATED: April 23, 2008

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